ABDUL MUTALIB DATO' SERI RAZAK

v.

THE MALAYSIAN BAR & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AZMEL MAAMOR J
T SELVENTHIRANATHAN J
HASHIM YUSOF J
[ORIGINATING MOTION NO: 17-14-90]
29 DECEMBER 1997

CIVIL PROCEDURE: *Postponement - Application for - When must application be made - Whether must be made in writing three days before hearing - No response from court - Whether must be treated as rejection of application - Application for postponement made at hearing without prior notice - Whether can be granted - Conditions to be satisfied*

CIVIL PROCEDURE: *Counsel - Refusal to proceed - Application for postponement denied - Whether appeal may be struck off - Change of solicitors*

The appellant was found by the disciplinary committee (appointed by the Chief Justice under the Legal Profession Act 1976) to have breached an undertaking to remit to the second respondent part of the proceeds of the sale of a piece of property upon sale or alternatively, to return the title deed free from all encumbrances within six months from the date of the undertaking. The disciplinary committee rejected the defence of the appellant and found that the surrendered title deeds to 18 other pieces of land were given in addition to, and not in substitution of, the undertaking. Thus, on 22 December 1989, the disciplinary committee ordered that the appellant be suspended from practising as an advocate and solicitor for six months, with a fine of RM5,000.

The present appeal by the appellant was from the abovementioned order, after having successfully obtained a stay of execution of the same. On 28 August 1997 ie, the hearing date, counsel for the appellant applied for a postponement. This application was denied and counsel was then asked to proceed, whereby she informed the court that she was not prepared to do so.

Held:

[1] Postponement is not as a matter of right. It is most improper to pre-empt the decision of the court. In exercising the discretion, the court has to consider the merits of the application. Thus, it is more prudent for counsels to write in to the court at least three days before the hearing of the application for postponement. A lack of response from the court must be assumed as a rejection of such an application and consequently, due preparation by counsels to proceed is needful for the hearing. Conversely, if the reasons forwarded are valid and a postponement is granted, the court's time may be utilised to hear another case.

[2] An application for postponement made at the commencement of the hearing of a case can only be granted if, firstly, there are valid and reasonable grounds for the postponement, and secondly, the applicant can explain why the court has not been informed of the application before the hearing date. In the present case, the application was only made orally on the day of the hearing. Nonetheless the merits of the application was heard but counsel for the appellant was unable to give any valid and reasonable grounds for the request of a postponement, nor reasons for the non-application of a postponement, in writing, prior to the hearing date.

[3] The issues involved were quite straightforward and mostly dealt with questions of fact and therefore could have been handled by any other partner of the firm of M/s Nik Saghir & Ismail with a similar degree of competence. As the court did not wish to question the wisdom of selection of an appropriate counsel to appear for the appellant, Cik D Nair, should have been ready to proceed with the hearing of the appeal and since she was not prepared to do so, the appeal had to be struck off.

[4] The statement by Cik D Nair that the appellant wanted to change his solicitors, could not be considered to be genuine, as no notice of discharge as solicitors was filed by M/s Nik Saghir & Ismail. In fact, the notice of appeal against this court's decision had been filed by M/s Nik Saghir & Ismail.

[Appeal struck off with costs.]

For the appellant - D Nair; M/s Nik Saghir & Ismail
For the 1st respondent - S Radhakrishnan; M/s Albar, Zulkifly & Yap
For the 2nd respondent - Khairuzzaman Muhammad; M/s Lawrence, Joseph Mahalingam & Co

Reported by Audrey J Pillai

JUDGMENT

Azmel Maamor J:

This case was fixed for hearing on 28 August 1997. Notice had been issued to all parties on 15 August 1997. There was no denial as to the receipt of the notice of hearing by the parties concerned. However on the day for hearing, counsel for the appellant, Cik D. Nair of Tetuan Nik Saghir & Ismail applied for a postponement. As postponement is at the absolute discretion of the court, we asked the counsel the reason for the postponement. She informed us that the counsel dealing with this case was Encik Nik Saghir who did not come to court on that day. When asked why Encik Nik Saghir was not in court Cik D. Nair was not able to give any reasonable explanation. We then told her that without giving satisfactory reasons we could not grant any postponement. We also informed her that this was an old out-standing case and it was not easy to obtain mutually suitable dates for the three judges who all have very heavy schedules of other cases to hear. Cik D. Nair was unable to furnish us with any satisfactory reason why Encik Nik Saghir did not appear in court. In the circumstances we told her that her application for a postponement was not granted for want of any satisfactory reason. We then asked her to proceed with the appeal. She informed us that she was not prepared to proceed with the appeal. It is highly improper for any counsel appearing in court applying for postponement to think that a postponement can be granted as a matter of right. As such the appeal was struck off.

The court expressed great concern regarding counsels appearing in court but not ready to proceed with hearing of the cases. (It would seem that Cik D. Nair in this case appeared in court with the idea that she could get a postponement as a matter of right. It is most improper to preempt the decision of the court. When a case is fixed for hearing the counsel who appears in court must ensure that he is ready to proceed for the hearing even though the counsel intends to apply for a postponement because granting of a postponement is at the discretion of the court. In exercising the discretion the court has to consider the merits of the application. The court will only grant a postponement if the court finds the reason given to be satisfactory. Otherwise the postponement will not be granted. For such purpose it would be prudent for counsels to write in to the court at least three days before the hearing applying for a postponement. By doing so the counsel may be able to know whether the application for postponement is going to be granted or not. If the court does not respond then the counsel must assume that the application is not granted and be ready for the hearing.

In the case before us there was no letter sent by the appellant to the court asking for any postponement. The application for postponement was only made orally by Cik D. Nair on the day of hearing when the case was called. Nonetheless we heard the merits of her application. An application for a postponement made at the commencement of the hearing of any case can only be granted if the following two conditions are satisfied. Firstly there are valid and reasonable grounds for the postponement; and secondly the applicant must explain why the court had not been informed of the application before the date of hearing. In this case Cik D. Nair was unable to give any valid and reasonable ground for the postponement. She could not satisfactorily explain why Encik Nik Saghir who was supposed to handle this case could not appear in court this morning. Nor did she give any reason why no letter had been written to court before the date of hearing applying for a postponement. We consider it very important for any party applying for a postponement to inform the court in advance that he is seeking a postponement and giving his reason. By so doing the court can consider it and if the reasons are valid would grant a postponement and at the same time fix another case for hearing so that the Court's time could be utilised to hear another case. In this case the notice for hearing had been issued on 15 August 1997 and the hearing was fixed on 28 August 1997. In the light of the fact that the counsel for the appellant was unable to furnish satisfactory reasons for the postponement we consider it highly improper for us to exercise our discretion to grant any postponement.

We have read the appeal record and from the contents we fail to see any good reason why such case needed to be handled by any particular counsel. The issues involved were quite straight forward and mostly dealt with questions of fact. Briefly, the Disciplinary Committee found on the evidence presented that the appellant had breached an undertaking given to the second respondent that he would remit RM6,000.000 from the proceeds of sale of a specified piece of property to the second respondent upon the successful completion of its sale or in the event the sale was not concluded have the title deed to the property returned to the second respondent free from all encumbrances within six months from the date of the undertaking. In doing so, the Disciplinary Committee rejected the defence that the appellant had discharged the undertaking by surrendering to the second respondent the title deeds to eighteen other pieces of land in substitution of the undertaking. The Disciplinary Committee found that the said title deeds were given in addition to, and not in substitution of, the undertaking. We could find no evidence on the record to show that this finding of the Disciplinary Committee was perverse in any way.

On 22 December 1989 the Disciplinary Committee ordered that the appellant be suspended from practising as an advocate and solicitor for six months and imposed a fine of RM5,000, with no order being made as to costs.

On 18 April 1990 the appellant, on a certificate of urgency, obtained an order from the High Court for a stay of the Disciplinary Committee's order until "the final disposal of the appellant's appeal ..." on the grounds that "pending the hearing of the appeal I am unable to practise as an advocate and solicitor as a result of which I will suffer irreparable loss and damage", and that "in the event I succeed in my appeal, the said loss and damage cannot be made good and will be irreparable if this application for stay is not granted." It therefore was in the appellant's own interest to have this appeal disposed off expeditiously. That being the situation, if Encik Nik Saghir for some reasons best known to himself could not attend or did not wish to attend the court hearing any other partners of the firm of Tetuan Nik Saghir & Ismail could have handled the case with similar degree of competence. The legal firm also have other legal assistants. In this case the firm instructed Cik G. Nair to appear. As we do not wish to question the wisdom of Tetuan Nik Saghir & Ismail as to who would be the appropriate person to appear for the appellant, we hold the view that Cik G. Nair, when appearing in court, should be ready to proceed with the hearing of the appeal. But she said she was not prepared to proceed with the appeal. In the circumstances we struck off the appeal.

There was one other matter. Cik D. Nair said that the appellant wanted to change his solicitors. We do not consider this statement to be genuine. If that is true then Tetuan Nik Saghir & Ismail should have filed in court a Notice of Discharge as solicitors. Yet no such letter had been filed. As a matter of fact the notice of appeal against this court's decision had been filed by Tetuan Nik Saghir & Ismail.

For the reasons as stated above we struck off the appeal with costs.